Issue: Qualification-Compensation/Leave-Workers' Compensation, Leave Approval/denial, Leave/Involuntary Charging; Ruling Date: March 6, 2002; Ruling #2001-063; Agency: Department of Corrections; Outcome: not qualified

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
March 6, 2002
Ruling # 2001-063

The grievant has requested a ruling on whether her March 8, 2001 grievance with the Department of Corrections (DOC) qualifies for hearing. The grievant claims that management has misapplied policy and subjected her to harassment, retaliation, discrimination, and a racially hostile work environment. As relief, the grievant requests that (1) the alleged harassment, retaliation, racial hostility, and discrimination stop; (2) she be reimbursed for her travel expenses to attend meetings on February 12 and 16, 2001; (3) she be accommodated under the Americans with Disabilities Act (ADA); (4) her leave balances be accounted for and restored; and (5) corrective action be taken against the superintendent and HR manager.

PRELIMINARY COMPLIANCE ISSUES

Adding New Issues

When the grievant forwarded her grievance to this Department, she presented an additional issue which was not included in her grievance; namely, that her change in shift on March 23, 2001, was made in retaliation for initiating the current grievance. However, once a grievance has been put in writing and addressed by management, a grievant may not expand the grievance to raise new issues. Because the complaint of retaliation for the change in shift assignment was not presented in the written grievance, the issue cannot be added to this grievance.[1]

30-Calendar Day Time Period

In attachments to her grievance Form A, the grievant alleges that she has been subjected to ongoing harassment, discrimination, and a racially hostile work environment. Specifically, the grievance appears to assert that during incidents on May 2, May 19, and September 28, 2000, and then again on February 12 and 16, 2001, the Superintendent spoke to her in an angry, loud, racially hostile, and demeaning manner. At qualification, management advised the grievant that it would not address issues raised in her grievance that transpired before the 30-calendar day period immediately preceding the initiation of her grievance.

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the event or action that is the basis of the

[1] *See* the *Grievance Procedure Manual*, § 2.4, page 6.

grievance.[2] It has been the longstanding position of this Department, however, that when a grievance alleges a continuing pattern of discrimination/racial hostility, as in this case, and one of the alleged incidents supporting the claims occurred within the 30-calendar day period, then management should give consideration to all the alleged actions, even those outside the 30-calendar day period preceding the initiation of the grievance, in order to determine whether there is evidence of a pattern of impermissible conduct and whether the grievance should be qualified for hearing.[3] Here, the alleged incidents on May 2, May 19, and September 28, 2000, and February 12 and 16, 2001, could, if proved, support the grievant's claim of ongoing racial discrimination and a hostile work environment. Therefore, management should have considered all these incidents when determining whether there had been a pattern of racial discrimination and hostility. Accordingly, for the purposes of this qualification ruling, this Department will consider all the grievant's allegations, including those prior to February 12, 2001.

QUALIFICATION DETERMINATION

FACTS

The grievant is employed by DOC as a Corrections Officer. On November 27, 2000, she experienced an injury on the job. Both the initial accident report and medical report indicated that there was no disability, and that the grievant was able to immediately return to work. However, without providing additional medical documentation to justify her absence, the grievant did not return to work until January 31, 2001. During her absence from work the agency applied various leave balances to allow the grievant to receive her regular compensation.

On February 9, 2001, the agency notified the grievant by letter that she would not be allowed to return to work until she provided medical documentation and to justify the periods of her absence from November 28, 2000 to January 31, 2001 and to detail any work restrictions. The HR Manager also called the grievant and asked her to attend a meeting with the superintendent on February 12, to discuss the required medical documentation. Prior to her meeting with the Superintendent, the grievant met with the Regional Administrator to discuss her concerns about the requested medical documentation and the use of her leave balances.

At the February 12th meeting, the grievant presented the Superintendent with some medical documentation, which the Superintendent deemed to be inadequate. The discussion between the Superintendent and the grievant then became very heated and confrontational, resulting in an abrupt termination of the meeting. At the conclusion of the meeting, the grievant revealed a tape recorder she had concealed in her purse to

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[2] *Id*

[3] *See* Valentino v. United States Postal Serv., 674 F.2d 56,65 (D. C. Cir. 1982)(quoting B. Schlei & P. Grossman, Employment Discrimination law, 232 (2nd ed. 1979)(to demonstrate a continuing violation a plaintiff must show " a series of related acts, one or more of which falls within the limitations period").

secretly record the meeting. She was then searched to determine if she had other unauthorized objects concealed on her person, such as a weapon. After the search, the grievant was escorted from the facility.

At a follow-up meeting on February 16, the issues were again discussed. The grievant was informed that she would be placed on leave without pay unless she elected to use her annual leave to cover her absence from November 28, 2000 to January 31, 2001. The grievant declined to use her annual leave citing that her absence had already been adequately documented. The meeting ended without resolution of any of the issues. In a letter on February 16, the grievant was again notified that medical documentation must be provided before she could return to work.

DISCUSSION

Misapplication/Unfair Application of Policy

Under state personnel policy, employees are required to report to work as scheduled.[4] Before taking a leave of absence from work, whether with or without pay, employees are to request and receive their agency's approval.[5] Therefore, employees who are absent from work without approval may not be paid for their time away from work.[6] Further, under DOC Policy 5-52 (7), an employee with a short-term disability who wishes to continue to work must submit a written request to the Organizational Unit Head for adjusted work assignments.[7] In light of the above, there is no evidence that the agency violated policy by asking the grievant to provide documentation to establish that her absences were warranted from a medical standpoint, and that she required adjusted work assignments or other accommodations as a result of an injury. Likewise, there is no evidence that the agency's actions violated the ADA.[8]

Racial Discrimination/Hostility/Harassment

Grievances that may qualify for a hearing include actions related to discrimination on the basis of race.[9] As an African-American, the grievant is a member of a protected class.[10] To qualify her grievance for a hearing, however, there must be more than a mere

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[4] *See* DHRM Policy 1.60.III (A).
[5] *See* DHRM Policy 4.30.III (A).
[6] *See* DHRM Policy 4.30.III (E).
[7] The employee must submit medical documentation, which describes the (1) extent or severity of the short-term impairment; (2) specific limitations the short-term impairment imposes upon the employee; and (3) anticipated length of time before the employee can fully resume the responsibilities of her regular position.
[8] When the need for an accommodation is not obvious, an employer, before providing a reasonable accommodation, may require that the individual with a disability provide documentation of the need for accommodation. Tatum v. Hospital of Univ. of Penn., 1999 U.S. Dist. LEXIS 10174 at 13-14. *See also,* Shelton v. G.E. Aerospace Division, 1998 U.S. Dist. LEXIS 5481 at 30 (same).
[9] *See Grievance Procedure Manual* § 4.1(b), page 10.
[10] The grievance Form A does not state the specific basis of the alleged discrimination, however, the claim was clarified as "racial discrimination " and addressed as such within the resolution steps.

allegation of discrimination--there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on her protected status; in other words, that because of her race, the grievant was treated differently than other "similarly-situated" employees. If, however, the agency provides a legitimate, nondiscriminatory business reason for its actions, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination. To establish a claim for a racially hostile work environment, an employee must prove that: (1) the conduct in question was unwelcome; (2) the harassment was based on race; (3) the harassment was sufficiently severe or pervasive to create an abusive work environment; and (4) there is some basis for imposing liability on the agency.[11]

As evidence of discrimination and a racially hostile work environment, the grievant cites the verbal confrontations with her superintendent on May 2 and 19, 2000; September 28, 2000; and again on February 12 and 16, 2001. Review of her claims and related information, however, provides no evidence that any racial discrimination exists. While the evidence suggests significant conflict between the grievant, the Superintendent, and the HR Manager, there is nothing to indicate that the conflict is the result of the grievant's race.

Retaliation

The grievant claims that on February 12, 2001, management (1) delayed meeting with her for three hours; (2) ordered a search of her person for a concealed weapon; and (3) directed that she be escorted from the facility in retaliation for having met with the Regional Administrator to discuss her concerns about medical documentation and the use of her leave balances. She also claims that she was retaliated against for asserting during the February 12th meeting that the meeting's purpose was to harass her.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[12]

Only the following activities are protected activities under the grievance procedure: (1) participating in the grievance process, (2) complying with any law or reporting a violation of such law to a governmental authority, (3) seeking to change any law before the Congress or the General Assembly, (4) reporting a violation to the State

[11] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998).
[12] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).

Employee Fraud, Waste and Abuse Hotline, or (5) exercising any right otherwise protected by law.[13] Here the grievant has presented no evidence that she engaged in any of the protected activities above.[14] Accordingly, the issue of retaliation does not qualify for a hearing.

General Harassment by Management

The grievant claims that she has been a victim of continuing harassment by the Superintendent and HR Manager. As evidence of harassment, the grievant asserts, for example, that management conditioned her return to work upon her providing medical documentation detailing her work restrictions and justifying the periods of her absence. Additionally, she cites the incident on February 12th in which she was searched and escorted from the facility. The General Assembly, however, has limited the issues that may be qualified for a hearing and the relief that may be awarded under the grievance procedure. Absent sufficient evidence of improper discrimination, retaliation, or a misapplication of policy, the type of harassing, unpleasant behavior alleged by the grievant is not among the issues that may be qualified for hearing.[15] Because this case presents no evidence of improper discrimination, retaliation or a misapplication of policy, the issue of harassment does not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, she must notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

It is noted that among the relief requested, the grievant asked that (1) the Superintendent and HR Manager be disciplined; (2) a full scale investigation be conducted and the Superintendent suspended pending the outcome; (3) the Superintendent and HR manager be required to attend classes on anger control, communications skills, team work, and management; and (4) the Superintendent be placed on probation.

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[13] Grievance Procedure Manual § 4.1(b), page 10.

[14] Expressing her views with the Regional Administrator on these topics is not a matter of public concern and thus not a protected exercise of free speech under the Constitution. See Waters v. Churchill, 511 U.S. 661, 698 (1994).

[15] Va. Code § 2.2-3004 (A) and (C); Grievance *Procedure Manual,* § 4.1, pages 10-11. Although all complaints in compliance with the grievance process may proceed through the resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing.

Even if the grievance were qualified by the circuit court, the scope of relief that a hearing officer may grant, is limited. For example, a hearing officer does not have the authority to direct that adverse actions be taken against another employee, including actions such as discipline, required training, suspension or placement on probation. Likewise, a hearing officer could not direct that an employee to attend training.

Finally, the grievance record reflects significant conflict between the grievant, Superintendent, and HR Manager. Mediation may help to resolve that conflict. EDR's mediation program is a voluntary and confidential process in which two neutral third parties, the mediators, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties involved.

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